In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1252

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

v.

MRS. G. J. RILEY, ADMINISTRATRIX OF THE ESTATE OF G. J. RILEY, DECEASED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA AND BRIEF IN SUPPORT THEREOF.

WHEELER & ATCHLEY,
Texarkana National Bank Building,
Texarkana, Texas.

ROBERTSON, LEACHMAN, PAYNE, GARDERE & LANCASTER and

HENRY D. AKIN,
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SUBJECT INDEX

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SIXTH SUPREME JUDICIAL DISTRICT OF TEXAS AT TEXARKANA.

To the Honorable Supreme Court of the United States:

NOW COMES The Texas and Pacific Railway Company petitioner, and prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas (the highest court of the State of Texas in which a decision could be had), affirming the judgment of the Fifth Judicial District Court of Cass County, Texas, for Thirty Thousand and No/100 ($30,000.00) Dollars, in favor of Mrs. G. J. Riley, Administratrix of the Estate of G. J. Riley, deceased, for the benefit of herself as widow

and of the three minor children of G. J. Riley, deceased, for the death of G. J. Riley, brought under the Federal Employers' Liability Act and petitioner respectfully shows:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Respondent brought this suit under the Federal Employers' Liability Act, Section 51, of Title 45, U. S. C., for the benefit of herself as surviving widow and Mamie Louise Riley, age 12, Evelyn Riley, age 10, and Robert Walyn Riley, age 6, surviving minor children of G. J. Riley, deceased, against petitioner in the State District Court of Cass County, Texas, for damages resulting from the death of G. J. Riley, who received fatal injuries while in the course of his employment by petitioner railroad company in the furtherance of interstate comerce, alleging that petitioner was guilty of certain specific acts of negligence proximately causing such death. (R. 1-5.) Petitioner entered a general denial and further pleaded that Riley's own negligence was the sole proximate cause of his death; that the negligence of Riley proximately contributed to cause his death and in the alternative that the death of Riley did not result from negligence upon the part of either Riley or petitioner but was an unavoidable accident. (R. 5-7.) The evidence consisted of the testimony of the Bridge and Building crew working with Riley at the time of his death. Such testimony appears in question and answer form on Pages 65 to 126, both inclusive, of the Record, and is accurately narrated on Pages 152 to 174 of Appendix to Petitioner's Brief in support of this petition. Such fully

developed and uncontroverted evidence shows that Riley was the most experienced member of the Bridge and Building gang (R. 86, 105, 113-4, 118), engaged in unloading a carload of piling ranging from 12 to 18 inches in diameter and from 30 to 45 feet long (R. 70) to be used in building a bridge on petitioner's main line near Cypress, Louisiana (R. 71) and were 54 piling loaded on a flat car (R. 72), spotted at the point where the piling were needed on a dump some eight or ten feet high. (R. 72.) The longer piling were on the bottom and so on up. (R. 89.) The piling were held in place on the flat car by means of seven stakes or standards about four inches in diameter inserted in iron loops, buckets or sockets on each side of the car and were fastened together by wires drawn between opposite stakes at intervals from the top to the bottom (R. 69, 84), the car containing the piling was stopped where the piling were needed. (R. 72.) The usual manner of unloading was to remove all but the end stakes on one side and weaken them near the bottom and remove all wires except the wires between the two end stakes at each end of the car and then cut the last two wires and let the weight of the piling break the last two weakened stakes, which would ordinarily cause the piling to fall off the weakened side. (R. 85, 106.) This is the way the loading was undertaken on the occasion in question (R. 74-7, 86, 106), and no one of the experienced employees on the job anticipated anything unusual. (R. 92.) The load was so even that at first the crew thuoght it leaned a little to the north but upon further deliberation, decided it leaned a little to the south and so they decided to unload on the south side by removing

the inside stakes and weakening the two end stakes on the south side. (R. 86, 96.) Riley actively participated in such decision (R. 86, 96, 105-6, 112, 113-4) and in the removal of the inside stakes and the weakening of the two end stakes on the south side, which was done in the customary manner (R. 106), and then climbed up on the car to cut the remaining top wire between the two end stakes at the west end of the car with an axe. (R. 89.) When G. J. Riley cut such wire, the wire between the two end stakes on the east end broke (R. 92), the load divided and all the stakes on both the north and south sides gave way and the load split or burst and the piling went both ways, some of the piling fell off the north side and some off the south side of the car and Riley either jumped or was thrown to the north side of the car and was crushed to death by the piling which fell on the north side. (R. 77-9, 104, 112, 117.) None of the experienced Bridge and Building crew had ever seen a load fall on both sides when the first wire was cut (R. 92, 95, 108), although one had seen one load of piling fall off the weakened side when only one wire was cut (R. 76), and one witness had seen a load fall off both sides when both wires were cut. (R. 91, 95.) The falling on both sides when only one wire was cut was wholly unexpected and unforeseeable and there was no reason to expect the piling to go off on the north side. (R. 92, 106.)

The case was tried before a jury and at the conclusion of the evidence, petitioner made a motion for an instructed verdict in its favor, which the trial court overruled (R. 7-9), and the case was submitted to the jury on special is-

sues in accordance with the common practice in the State of Texas. (R. 9 to 15.) The jury found in response to special issues submitted that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of the defendant other than deceased so as to cause the entire load of piling to give way when the deceased Riley cut the wire at the west end of the car; that the car of piling was overloaded at the time the crew under Mr. Waters attempted to unload the same; that the defendant failed to furnish the deceased a reasonably safe place to work under the conditions existing; and that each of said acts or omissions constituted negligence and a proximate cause of Riley's death. (R. 10-12.) The jury further found that Riley was not guilty of contributory negligence (R. 12-13); that the death of Riley was not the result of an unavoidable accident (R. 13) and apportioned the damages as follows:

To Mrs. G. J. Riley	$15,000.00
To Mamie Larice Riley	5,000.00
To Evelyn Marie Riley	5,000.00
To Robert Waylin Riley	5,000.00

(R. 14.)

Petitioner made a motion for judgment non obstante veredicto, which was overruled (R. 25-33) and respondent filed a motion for judgment on the verdict (R. 60) which was sustained and judgment was rendered on the verdict in favor of respondent against petitioner for Thirty Thousand and No/100 ($30,000.00) Dollars, apportioned as above and for all costs of suit. (R. 61-62.)

Petitioner duly perfected its appeal from such judgment to the Court of Civil Appeals for the Sixth Supreme Ju-

dicial District of Texas at Texarkana, Texas, which affirmed the judgment of the trial court (R. 136), holding in its written opinion that there was no evidence to support the findings of the jury that petitioner was negligent in overloading the car, and that such negligence was a proximate cause of Riley's death, but further holding that aided by the res ipsa loquitur rule of evidence, from the mere happening of the accident, the circumstances did support the jury findings that petitioner was negligent, in that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant other than deceased so as to cause the entire load of piling to give way when the deceased Riley cut the wire at the west end of the car, and in failing to furnish the deceased a reasonably safe place to work under the conditions existing, and that such negligence was a proximate cause of Riley's death and that the Thirty Thousand and No/100 ($30,000.00) Dollar judgment was not excessive, although more than twice the amount Riley would have earned during his life expectancy, considering the value of the services Riley might have rendered in training and educating his children. (R. 127-137.)

Petitioner duly filed a motion for rehearing in the Court of Civil Appeals (Appendix to Petitioner's Brief, pp. 119-145), which was overruled (R. 137) and duly filed its application for a writ of error to the Supreme Court of Texas (Appendix to Petitioner's Brief, pp. 147-221), which was refused by the Supreme Court of Texas, with the docket no-

tation "Refused for want of merit,"* (R. 137), and petitioner duly filed a motion for rehearing of its application for writ of error (Appendix to Petitioner's Brief, pp. 235-246), which was overruled by the Supreme Court of the State of Texas on March 7, 1945 (R. 138), whereby the judgment of said Court of Civil Appeals became a final judgment rendered by the highest court of Texas in which a decision could be had†, and where is drawn in question some right, privilege or immunity under the Federal Employers' Liability Act of which petitioner has been unjustly denied clearly to its prejudice and this application is being duly filed in order that justice may be done.

STATEMENT OF BASIS FOR JURISDICTION

1. The jurisdiction of this Honorable Court is based upon Paragraph (b) of Section 344, Title 28, United States Code (Judicial Code Section 237, Amended), which provides:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Con-

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* Rule 483 of the Texas Rules of Civil Procedure provides in part in reference to a refusal by the Supreme Court of Texas for an application for a writ of error: "In all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it will refuse the application with the docket notation 'Refused for want of merit'."

† **Chesapeake & O. R. Co. v. Kuhn**, 284 U. S. 44, 52 S. Ct. 45, 76 L. Ed. 157.

> stitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

and is also based upon Paragraph (a) of Section 5 of Rule 38 of the Revised Rules of the Supreme Court of the United States, which provides that this Honorable Court may review a case on writ of certiorari "(a) Where a state court has decided a Federal question of substance * * * in a way probably not in accord with applicable decisions of this court."

2. In holding petitioner liable to respondent for Thirty Thousand and No/100 ($30,000.00) Dollars under the Federal Employers' Liability Act for injuries resulting in the death of petitioner's employee, Riley, under Section 51, of Title 45, U. S. C., where there was no proof of any alleged specific negligence of petitioner and no proof of any negligence that could have been a proximate cause of the injuries, on the doctrine of res ipsa loquitur, on a mere scintilla of evidence, on surmise, speculation and conjecture, and on circumstances supporting other just as plausible conclusions, where the uncontroverted evidence showed that the negligence, if any, was that of deceased himself, and where the amount of damages exceeded the deceased's earning capacity during the remainder of his life expectancy, the Court of Civil Appeals (which was the highest court of the State of Texas in which a decision could be had in this case where the Supreme Court of Texas refused for want of merit an application to it for a writ of

error) has denied to petitioner rights claimed by it under said United States statutes, and has decided Federal questions of substance in conflict with the applicable decisions of this Honorable Court and of the Federal Circuit Courts of Appeal. In view of the erroneous application by the state court of the Federal statutes to the facts of this case, both with respect to the conditions of liability and the measure of damages, this Honorable Court most certainly has jurisdiction to review such erroneous holdings of the state court. A copy of the opinion delivered by the Court of Civil Appeals upon rendering the judgment sought to be reviewed appears on Pages 127-136 of the Record and is hereby appended hereto by reference.

3. There are numerous cases sustaining the jurisdiction of this Honorable Court to grant a petition for a writ of certiorari and review a decision of a state court under the Federal Employers' Liability Act where the evidence is insufficient to support the judgment of the state court and where such state court has held differently from the holdings of this Honorable Court as to liability and the measure of damages under such Federal statutes, and petitioner will cite only a few of such pertinent cases which clearly confer jurisdiction upon this Honorable Court:

The case of *Atlantic Coast Line R. Co. v. Davis*, 279 U. S. 34; 49 S. Ct. 210; 73 L. Ed. 601, holds that on writ of certiorari to review judgment of state court for death of railroad employee under the Federal Employers' Liability Act, if record shows, under applicable principles of law as interpreted by Federal courts, that evidence was not sufficient in kind or amount to warrant a finding that

the railroad's negligence was the cause of the death, the judgment must be reversed.

The case of *Chesapeake & O. R. Co. v. Kuhn*, 284 U. S. 44, 52 S. Ct. 45; 76 L. Ed. 157, holds that where any court fails to accept the United States Supreme Court's interpretation in a case governed by the Federal Employers' Lialibity Act, the United States Supreme Court will determine and apply the proper remedy.

The case of *Willis v. Pennsylvania R. Co.*, 122 F. (2d) 248, certiorari denied, 314 U. S. 684, holds that whether evidence of negligence is sufficient for jury is determined by Federal rather than State decisions.

The case of *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 S. Ct. 556, 61 L. Ed. 1057, holds that the Federal Employers' Liability Act applies to cases where there is no cause of negligence for which carrier is responsible, as well as to those in which liability is imposed, and in both cases, such act is exclusive of state regulations.

The case of *Brady v. Southern Ry. Co.*, 320 U. S. 476; 64 S. Ct. 232, 88 L. Ed. 189, holds that under the Federal Employers' Liability Act the sufficiency of evidence of negligence must be determined by this Honorable Court finally as the sufficiency of the evidence to support a finding of a Federal right to recover is a Federal question and there must be more than a scintilla of evidence before the case may be properly left to the discretion of the jury, that bare possibility is not sufficient and events too remote to require reasonable provision need not be anticipated, and when the evidence is such that without weighing the credi-

bility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict, and by such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims.

The case of *Delaware, L. & W. R. Co. v. Koske*, 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 578, holds that the Federal Employers' Liability Act permits recovery on the basis of negligence only, and that the burden is on a plaintiff to adduce reasonable evidence to show a breach of duty owed by defendant to him in respect of the place where he was injured and that injuries resulted therefrom.

The case of *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U. S. 587, 49 S. Ct. 442, 73 L. Ed. 861, holds that the language of the Federal Employers' Liability Act shows unmistakably that the basis of recovery is negligence and that without such negligence no right of action is given under this Act.

The case of *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896, holds that employer's negligence must cause injury to authorize recovery, and that jury can not be permitted to speculate as to cause of employee's death in action against employer.

The case of *Union Pac. R. Co. v. Huxoll*, 245 U. S. 535, 38 S. Ct. 187, 62 L. Ed. 455, holds that it is proper for the United States Supreme Court to examine the evidence in the record to determine the validity of the claim under

the Federal Employers' Liability Act where such evidence relates to the only negligence claimed in the case, for the reason that it presents a Federal question, not of fact but of law.

The case of *Brennan v. Baltimore & O. R. Co.*, 115 F. (2d) 555, certiorari denied, 312 U. S. 685, holds that an employee must produce substantial evidence of negligence and can not base his case upon mere speculation.

The case of *Western & Atlantic R. R. v. Hughes*, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473, holds that the scintilla rule can not be applied by a state court in an action under the Federal Employers' Liability Act as the Federal rule as to the quantum of proof necessary to go to the jury is controlling.

The case of *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361, holds that it is not sufficient to show that the employer may have been guilty of negligence and where the testimony leaves the matter uncertain and shows that any one of a half dozen things may have brought about the injury for some of which the employer is not responsible, it is not for the jury to guess between these half dozen causes and find that the negligence of employer was the real cause, and if employee is unable to adduce sufficient evidence to show negligence, it is only one case in which the plaintiff fails in his testimony and no mere sympathy for the unfortunate victim justifies a departure from such rule.

The case of *Entsminger v. Yazoo & Mississippi Valley R. Co.*, 142 F. (2d) 592, holds that under an identical state

of facts presented in the case at bar, where the customary manner of loading the car with logs was complied with an instructed verdict in favor of defendant was proper under the Federal rule.

The cases of *Southern Ry. Co. v. Edwards*, 44 F. (2d) 526, and *Anderson v. Southern Ry. Co.*, 20 F. (2d) 71, hold that the man who cut the wire holding a load of poles is guilty of contributory negligence as a matter of law.

The case of *Chesapeake & O. Ry. Co. v. Kelly*, 241 U. S. 485, 36 S. Ct. 630, 60 L. Ed. 1016, holds that the question of the proper measure of damages is inseparatably connected with the right of action, and in cases arising under the Federal Employers' Liability Act, it must be settled according to the general principles of law as administered by the Federal courts.

The case of *Sabine Towing Co. v. Brennan*, 85 F. (2d) 478, holds that 6% is a just and reasonable rate of interest in determining the amount of money that capitalized at such rate would yield annually the same income that the injured person might have expected from the deceased, using the interest and part of the capital from year to year, and that such method is the proper one by which to measure the compensation for deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.

4. The judgment of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana became final fifteen days after March 7, 1945, when the Supreme Court of Texas overruled petitioner's motion for

rehearing of its application for a writ of error, and this petition for a writ of certiorari, the record and supporting brief are being filed in this Honorable Court well within three months after the entry of such judgment as allowed by U. S. Code, Title 28, Section 350. There can be no serious contention that this Honorable Court does not have jurisdiction to correct such erroneous judgment of the state court in this action brought under the Federal Employers' Liability Act.

QUESTIONS PRESENTED

1. Whether there is any evidence that petitioner was guilty of the specific negligence alleged proximately causing the death of Riley.

2. Whether the doctrine of res ipsa loquitur is applicable where specific acts of negligence are relied upon, where the facts are fully developed and where the instrumentality causing the injury was partially under the control of the injured person, and where such ground of recovery was waived under the local court rules.

3. Whether the negligence, if any, was that of the person receiving the injury.

4. Whether Thirty Thousand and No/100 ($30,000.00) Dollars was an excessive amount of damages when greatly in excess of the deceased's prospective earnings and capable of producing more income than deceased could have earned.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The holding of the Court of Civil Appeals that in the absence of any direct evidence of negligence the doctrine

of res ipsa loquitur could be invoked to support the jury findings that stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant, other than deceased, so as to cause the entire load of piling to give way when the deceased Riley cut the wire at the west end of the car and that defendant failed to furnish the deceased a reasonably safe place to work under the conditions existing, that same constituted negligence and proximate causes of Riley's death, is contrary to the holdings of this Honorable Court and the various Circuit Courts of Appeal (and the Federal construction of the Federal Employers' Liability Act is binding on the state courts) in numerous cases, and deprived petitioner of its valuable rights under such United States statute.

There is no evidence as to who cut the end stakes on the south side of the car, or how deep they were cut. Cutting such stakes too deep on the south side could not possibly have caused the stakes on the north side of the car to give way. An immutable law of physics is that greater weakening of the stakes on the south side correspondingly strengthened the stakes on the north side. *The Court of Civil Appeals can not repeal such natural law.* Therefore, the extent of the cutting of the stakes on the south side (even if respondent had proved that they were cut too deep by an employee of petitioner, which she wholly failed to do) could not possibly have been a proximate cause of the stakes on the north side breaking and letting the piling roll off the north side and fall on Riley, and it was the stakes falling on the north side that caused Riley's death. None of the experienced employees on the job had ever seen such a load

split and fall on both sides of the car when only one wire was cut, and such result was not foreseeable.

Neither is there any evidence of failure to furnish a reasonably safe place to work. Nothing was shown to have been done or left undone to render the place of work any more unsafe than the very danger inherent in the work rendered it. The place of work was necessarily up on the car in order to cut the wires as they were ordinarily cut with safety. No slick place, rough place or faulty appliance on the car of any nature whatsoever was shown. The unexpected falling of the piling to the north was what caused the injuries to Riley and it would have made no difference if he had had a net to jump into or a feather bed to jump onto, as the piling falling off the car on top of him caused the injuries, and nothing about the place of work caused part of the piling to roll off the north side and injure Riley. Therefore, there was no proof of failing to furnish a safe place to work, and even if there had been such failure, it could not possibly have been the proximate cause of the piling unexpectedly falling off the north side of the car and injuring Riley, who had jumped or fallen to the north side.

The Court of Civil Appeals correctly held there was no evidence to support the finding of the jury that the car of piling was overloaded.

Realizing the want of proof of any negligence proximately causing Riley's injuries, the Court of Civil Ap-

peals was forced to resort to the doctrine of res ipsa loquitur to affirm the judgment of the trial court, misinterpreting the holding of the Supreme Court of Texas in the case of *Roberts v. Texas & P. Ry. Co.*, 180 S. W. (2d) 330, as supporting its position, when in fact such case holds directly contrary to the holding of the Court of Civil Appeals in this case*.

This application should be granted in order to correct the erroneous holding of the Court of Civil Appeals that there was sufficient evidence to support the findings of the jury of specific acts of negligence proximately causing Riley's death and that the doctrine of res ipsa loquitur is applicable.

Under the undisputed evidence, Riley was the most experienced man on the job and was taking the lead in unloading the piling. Indisputably, if there was any negligence on the occasion in question, causing Riley's injuries, it was bound to have been Riley's own negligence and there is no evidence to support the finding of the jury that Riley was not guilty of contributory negligence at least.

Regardless of whether or not such contributory negligence be taken into consideration, the verdict of the jury and judgment for Thirty Thousand and No/100 ($30,000.00) Dollars is grossly excessive and should not be per-

* The **Roberts case, supra,** specifically holds: "Specific acts of negligence were pleaded by Roberts, which it was **necessary** for him to establish in order to make out his case." (Emphasis added.)

mitted to stand. Such sum greatly exceeds the loss of the beneficiaries resulting from being deprived of a reasonable expectation of pecuniary benefits by Riley's death, as it is much more than Riley could reasonably have expected to earn during the remainder of his life expectancy and at the legal rate of interest in Texas, would return more income than deceased was earning during the prime of his life. The reasonable pecuniary value of the nurture, care and education the three minor children would have received from deceased during their minority had deceased lived can not possibly make up the difference when deceased's work kept him away from home while working, and where the jury apportioned to the widow a sum equal to the total of the sums awarded to the three children.

This application should be granted in order to correct the erroneous holding of the Court of Civil Appeals that there was sufficient evidence to support the Thirty Thousand and No/100 ($30,000.00) Dollar verdict and judgment.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue in this cause to the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas, and that upon hearing by this Honorable Court the judgment of such Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, Texas, be reversed and that petitioner have such

other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted,

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J. T. SUGGS,
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Texas and Pacific Railway Company,
Dallas, Texas,

By .....
Counsel for Petitioner,
The Texas and Pacific Railway Company.

APPENDIX

SPECIFICATIONS OF ERROR

The following points of error were assigned in the courts below and are specifically brought forward and made a part of this petition:

FIRST POINT

The error of the Court of Civil Appeals in overruling petitioner's point that the trial court should have instructed a verdict in favor of petitioner. (Germane to grounds Nos. 18, 21, 22, 25, 28 and 36 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

SECOND POINT

The error of the Court of Civil Appeals in overruling petitioner's point that the trial court should have rendered judgment in favor of petitioner notwithstanding the verdict of the jury. (Germane to ground No. 40 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

THIRD POINT

The error of the Court of Civil Appeals in holding that the res ipsa loquitur rule of evidence applies to the case even though the action is based upon allegations of specific acts of negligence and the thing causing the injuries was partially under the management of the injured party. (Germane to ground No. 10 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

FOURTH POINT

The error of the Court of Civil Appeals in holding that the circumstances are materially strengthened so as to support the jury's findings of negligence by the failure of petitioner to offer any explanation of the occurrences resulting in Riley's death which would excuse it. (Germane to ground No. 9 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

FIFTH POINT

The error of the Court of Civil Appeals in holding that the circumstances sustained the verdict of the jury that employees of petitioner other than deceased negligently cut the stakes on the south side of the car which held the load of piling to such extent as to cause the carload of piling to give way when the deceased, Riley, cut the wire at the west end of the car. (Germane to grounds Nos. 2, 3, 4, 5, 8, 9 and 11 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

SIXTH POINT

The error of the Court of Civil Appeals in holding that the negligent act of cutting the stakes on the south side of the car was the proximate cause of Riley's death. (Germane to grounds Nos. 7 and 8 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

SEVENTH POINT

The error of the Court of Civil Appeals in holding that the record reveals circumstances raising an issue of fact

as to whether petitioner negligently failed to furnish deceased a reasonably safe place to work under the conditions and on the occasion when he met his death. (Germane to grounds Nos. 13, 25 and 28 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

EIGHTH POINT

The error of the Court of Civil Appeals in holding that the negligent act or omission of petitioner in connection with failing to furnish deceased a reasonably safe place to work was a substantial factor contributing to the death of Riley. (Germane to ground No. 14 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

NINTH POINT

The error of the Court of Civil Appeals in overruling petitioner's point that if there was any negligence proximately causing Riley's death, said Riley was guilty of negligence as a matter of law. (Germane to grounds Nos. 36, 37, 38 and 39 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

TENTH POINT

The error of the Court of Civil Appeals in holding that the verdict for Thirty Thousand and No/100 ($30,000.00) Dollars was not excessive under the Federal Employers' Liability Act. (Germane to grounds Nos. 15, 16, 17 and 35 of Appellant's Motion for Rehearing in Court of Civil Appeals.)

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. .....

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

v.

MRS. G. J. RILEY, ADMINISTRATRIX OF THE ESTATE OF G. J. RILEY, DECEASED,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF COURT BELOW

The official report of the opinion of the Court of Civil Appeals for the Sixth Supreme Judicial District of Texas at Texarkana, is reported in 183 S. W. (2d) 999, and appears on Pages 127 to 136 of the printed record filed herein, to which reference is here made.

GROUNDS OF JURISDICTION

A statement of the grounds on which the jurisdiction of this Honorable Court is invoked is contained in the foregoing petition and is here adopted.

CONCISE STATEMENT OF THE CASE

A statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to the printed record is contained in the foregoing petition and is here adopted.

SPECIFICATION OF ASSIGNED ERRORS

A specification of such of the assinged errors as are intended to be urged is set forth in the appendix to the foregoing petition, to which reference is here made.

POINTS PRESENTED AND ARGUMENT

SUMMARY OF ARGUMENT

I. The Court of Civil Appeals erred in holding that the trial court properly overruled petitioner's motion for an instructed verdict and its motion for judgment non obstante veredicto.

A. There is no evidence to support the finding of the jury that the stakes holding the load of piling on the south side of the car were negligently cut to such extent by employees of the defendant, other than deceased, so as to cause the entire load of piling to give way when the deceased, Riley, cut the wire at the west end of the car.

1. There is no evidence that either of the two end stakes were cut to any extent by employees of defendant, other than deceased. They were hacked with an axe and deceased is the only person shown to have had an axe on the occasion in question.

2. There is no evidence as to what extent said two remaining stakes were cut.

3. The circumstances were not sufficient to support such finding.

(a) Such negligence must be shown by direct evidence.

(b) The unloading was handled in the usual and customary manner.

(c) Experienced men on the job were more capable of judging whether the unloading was handled in a proper way than was the jury.

(d) The circumstances show no more than an inherently dangerous operation which is not actionable.

(e) The circumstances are not strengthened by the failure of petitioner to offer merely cumulative evidence.

B. There is no evidence to support the finding of the jury that negligence in cutting the stakes on the south side was a proximate cause of the fatal injuries resulting from the piling falling off the north side.

1. *Under natural laws* (over which courts have no control) the weakening of the stakes on the south side would correspondingly strengthen the stakes on the north side so as to render them less likely to give way.

2. The falling of the load to the north was unusual and unforeseeable.

3. The injuries just as likely arose from some other causes, such as a latent defect in the wire on the east end or a hidden defect in the stakes on the north side, and such finding is therefore based on speculation and pyramiding presumptions.

C. There is no evidence to support the finding of the jury that defendant negligently failed to furnish the deceased a reasonably safe place to work under the conditions existing.

1. There is no evidence of any defect in the place where the piling had to be unloaded, nor is there any evidence of any other kind of a place that should have been furnished, nor that defendant failed to do anything that was ordinarily done or that it could have done.

2. There is no evidence of any way in which the place could have been made safer.

D. There is no evidence to support the finding of the jury that negligence in failing to furnish a reasonably safe place for work to deceased was a proximate cause of the fatal injuries of deceased.

1. The work of unloading piling was inherenntly dangerous and had to be performed where the piling was needed and the mere happening of the accident is no evidence of failure to furnish a reasonably safe place to work. The jury evidently mistook an inherently dangerous operation for failure to furnish a safe place for work.

2. Regardless of the safety of the place for work, the piling falling on deceased would have killed him just as dead.

E. Failure of respondent to make out a case on the specific negligence alleged can not be cured by the doctrine of res ipsa loquitur.

1. Right to recover under res ipsa loquitur doctrine was waived by no issue being submitted or requested thereon.

2. Instrumentality was partly under control of deceased, who was the most experienced man on the job and was taking the lead in unloading the piling.

3. The facts were fully developed by the eye witnesses used by plaintiff.

4. The doctrine of res ipsa loquitur is not applicable to such a suit under the Federal Employers' Liability Act.

II. The court erred in not holding, if there was any evidence of negligence proximately causing Riley's death, that Riley was guilty of contributory negligence either solely causing or proximately contributing to cause his injuries.

A. The deceased was experienced in unloading piling, took the lead in the unloading operation, and cut the wire himself, and if he could not foresee the disasterous result neither could defendant be charged with such foresight.

III. The Court of Civil Appeals erred in holding that the judgment for Thirty Thousand and No/100 ($30,000.00) Dollars was not excessive.

A. The proper measure of reimbursement to allow beneficiaries for the reasonable expectation of pecuniary benefits that would have resulted from the continued life of deceased, arrived at by determining an amount, which, capitalized at a reasonable rate of interest, would yield annually the same income the person injured might have expected from the deceased, using the interest and part of the capital from year to to year, amounted to only Twelve Thousand One Hundred Ninety-five and 39/100 ($12,195.39) Dollars, and the income alone from Thirty Thousand and No/100 ($30,000.00) Dollars would exceed deceased's entire income.

B. Deceased only earned money while away from home and the value of the nurture, care and education the three minor children would have received from deceased during their minority could not make up the difference between Twelve Thousand One Hundred Ninety-five and 39/100 ($12,195.39) Dollars and

Thirty Thousand and No/100 ($30,000.00) Dollars, and certainly could not account for the Fifteen Thousand and No/100 ($15,000.00) Dollar allowance to the widow.

POINT NO. I

The Court of Civil Appeals erred in holding that the trial court properly overruled petitioner's motion for an instructed verdict and its motion for judgment non obstante veredicto.

Argument under Point No. I

At the conclusion of the evidence in the trial court, the petitioner made a motion for an instructed verdict in compliance with Rule 268 of the Texas Rules of Civil Procedure*, setting forth as the specific grounds therefor the matters herein erred. (R. 7-9.)

The trial court overruled such motion (R. 9) and submitted the case to the jury on special issues limited to three specific allegations of negligence. (R. 10-12.) Respondent requested the submission to the jury of no other issue. Under the Texas practice, all other possible grounds of recovery were waived†. The jury answered all of such issues favorable to respondent and petitioner made a motion for judgment in its favor non obstante veredicto (R. 25-31)

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* Said rule 268 reads: "A motion for directed verdict shall state the specific grounds therefor."

† Rule 279 of the Texas Rules of Civil Procedure provides: "* * * Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; * * *."

under Rule 301 of Texas Rules of Civil Procedure*. It thus remains to be seen whether there is any substantial evidence to support the findings of the jury on any one of such three specific grounds of alleged negligence. The evidence is all narrated on Pages 152 to 174 of the appendix to this brief, to which reference is here made and conspicuous by its absence is any evidence of negligence of petitioner proximately causing the injuries to the deceased.

In response to the special issues submitted to it, the jury found that petitioner was negligent in that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant other than deceased so as to cause the entire load of piling to give way when the deceased, Riley, cut the wire at the west end of the car, in that the car of piling was overloaded at the time the crew under Mr. Waters attempted to unload same and in that the defendant failed to furnish the deceased a reasonably safe place to work under the conditions existing, and that such negligence was a proximate cause of Riley's injuries.

The Court of Civil Appeals set side such finding as to any negligence in overloading the car of piling on the ground that same was without support by any evidence, and since such finding has not been attacked or appealed from, it has become final. Petitioner will, therefore, consider further only the matters of the extent of the cutting

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* Said Rule 301 provides: "* * * Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. * * *"

of the stakes on the south side and the matter of furnishing a safe place to work, and whether either could have been a proximate cause of Riley's injuries, as held by the Court of Civil Appeals with the aid of the res ipsa loquitur rule of evidence (which we shall see presently is wholly inapplicable to this case and the circumstances).

A. No Evidence of Negligence of Petitioner in Cutting Stakes.

The finding that the stakes holding the load of piling on the south side of the car were cut to such extent by employees of defendant other than deceased as to cause the entire load of piling to give way when deceased, Riley, cut the wire at the west end of the car has absolutely no support in the evidence. In a futile attempt to show that the two end stakes on the south side were cut by an employee of defendant other than Riley, petitioner can cite only the testimony of the witness R. E. Nelson, as follows:

"Q. Did you use the saw on any of those stakes?

"A. I didn't.

"Q. Did you notice anybody else using one?

"A. I recall Doug Waters and Walter Byles using a saw on one stake.

"Q. Which end of the car was that on?

"A. The west end." (R. 103.)

Such testimony pertains to sawing on the second stake from the south end which was completely removed. (R. 115-116, 99.) The end stakes were not sawed but were hacked with an axe (R. 74) and Riley is the only person shown

to have had an axe. (R. 112.) Plaintiff's witness Byles testified that the only stake he and Waters sawed was the second stake from the end which was completely removed. (R. 115-6.) Such specific testimony* precludes any possible inference that Byles and Waters sawed the stake at the extreme west end of the south side of the car. The record is devoid of any evidence as to who cut the stake at the east end of the south side of the car. (R. 111.)

Neither is there any evidence that the two end stakes were cut too deep. In an abortive attempt to show that the two end stakes were cut too deep, respondent can cite only the following isolated excerpts from the testimony of R. E. Nelson:

> "Q. I believe you said that you were at the west end of this piling car on the south side?
>
> "A. Yes, sir.
>
> "Q. That was the side where you expected and believed that the piling would come off on?
>
> "A. Yes, sir.
>
> "Q. You believed that because you had taken out all the stakes except the two end stakes?
>
> "A. As well as I knew.
>
> "Q. And they had weakened as you customarily weakened them?
>
> "A. Yes, sir.

* In the case of **Penn. R. R. Company v. Chamberlain**, 288 U. S. 333, this Honorable Court said: "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proved facts and this is not pemissible in face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the facts sought to be inferred did not exist."

"Q. And you expected that load when it was cut like it always had been to shift to the side where there were virtually no stake and roll off on that side?

"A. Yes, sir." (R. 106.)

In grasping vainly at a straw, respondent seeks to remove such testimony from its setting and to interpret same erroneously to mean that the stakes were cut to exactly the same depth as stakes have been cut on smaller loads. Such strained construction is clearly precluded by the further testimony of this same witness that he does not recall seeing any axe work (R. 104) when the uncontroverted evidence is that the two end stakes on the south side were notched with an axe. (R. 74.) Undoubtedly, when taken in connection with the context, such testimony pertains to the general method and manner of weakening the stakes, rather than to the specific extent and depth to which they were cut. Such testimony is strongly in petitioner's favor since *the weakening of the stakes in the usual and customary manner would tend to negative any negligence*, and respondent's attempt to turn the tables on such damaging testimony to her falls flat.

It is well established that in this kind of a case the plaintiff must establish negligence by *direct* evidence*. This Honorable Court said in the case of *Patton v. Texas and Pacific Ry. Co.*, 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed.

* In the case of **Southern Ry. Co. v. Stewart**, 115 F. (2d) 317, on Page 322, the court said: "A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption can not be built on another." (Emphasis added.)

361, in reference to the rule obtaining in the case of an injury to an employee:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. Texas & Pacific Railway v. Barrett, 166 U. S. 617. Second. That in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence—the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for a jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs. * * * No one can say from the testimony how it happened that the step became loose. Under those circumstances, it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer."

A case directly in point is the case of *Entsminger v. Yazoo & Mississippi Valley R. Co.*, 142 F. (2d) 592 (Fifth Circuit), in which the plaintiff was seriously injured while assisting in unloading a car of poles when the stakes on the unweakened as well as the weakened side gave way and the load fell off both sides of the car. The trial court

instructed a verdict for defendant and the Circuit Court of Appeals affirmed such judgment holding:

> "The evidence established that the *customary* mode of loading the car with logs for shipment was complied with in this case." (Emphasis added.)

The uncontroverted testimony in the case at bar is that the car of piilng was loaded in the customary and usual manner and was wired in the customary and usual manner and was unloaded in the customary manner by first removing all the stakes on one side except the end stakes on the side you expect them to come off and after this is done, the end stakes on the side you expect the load to go off on are hacked or weakened and then all the wires except the top wire on the end stakes are cut and that was the practice and custom in Bridge and Building work of railroad companies and that was the practice they used in this case and they did not deviate from the customary and usual practice in unloading those poles. (R. 84-86.)

In 20 *R. C. L.* 30, the rule is thus stated:

> "Every one may rightfully rely upon experience and as a rule he is not to be charged with negligence in respect of acts which conform to a practice that existed for years without resulting in any injury."

In the case of *Canadian Northern Ry. Co. v. Walker*, 172 F. 346, the court says on Page 352:

> "Skilled and experienced railroad operators are more competent than jurors or judges to choose methods of operating railroads, and when a railroad company, as in this case, has selected and adopted a customary method of loading and unloading its cars and removing temporary obstructions necessarily used in that work, which is neither palpably unreasonable nor

clearly dangerous, it owes servants no duty to adopt a different method and it can not be held guilty of negligence because it has not done so."

The Sixth Circuit of Appeals uses the following language in the case of *Hylton v. Southern Ry. Co.*, 87 F. (2d) 393:

> "Further, there is a fatal infirmity in the new ground of negligence alleged. It involves an engineering problem of railroading, and the judgment of the engineers of the railroad company may not be reviewed by a jury with the view of finding actionable negligence. The change in the rule, and the omission of the requirement of turning retainer valve handles up, involved a survey of the grades and the brake system employed by the railroad company. The judgment of the railroad company's engineers in reaching the conclusion it did, may not be reviewed by a jury."

To the same effect is the holding in the case of *Louisville & Nashville R. R. Co. v. Davis*, 75 F. (2d) 849, wherein the court said:

> "The rule is well settled that the master is not bound to use the safest and best method or contrivance to meet the legal requirement of reasonable care, and that in any event reasonable engineering and scientific judgment is not subject to review by a jury."

The respondent seeks to *accentuate* the *negative*. She seeks to make out a case upon petitioner's lack of evidence, rather than from the force of any testimony offered in evidence. The witnesses who testified gave all the details of the occurrence, and petitioner should be commended rather than penalized for not offering cumulative evidence. The circumstances showing just what took place were fully developed and undisputed. The rule relied upon by respon-

dent pertaining to the failure of one party to offer explanations strengthening the other party's evidence, clearly has no application where, as here, there is no evidence of any negligence or proximate cause for it to strengthen, but respondent's own witnesses testified to the facts fully and negatived any negligence or proximate cause. The rule under such circumstances is thus stated in 17 *Tex. Jur.* 305-307:

> "No presumption arises from the failure of a party to produce evidence where there is no duty resting upon him to disclose the facts, or where the burden is on the opposite party to sustain the affirmative of the issue, nor from the failure to introduce evidence which is equally available to both parties. * * *
>
> "But this rule has no application until the plaintiff has made out a prima facie case against the defendant, nor where the plaintiff himself introduces testimony which overcomes any presumption that the defendant is in possession of any other evidence on the subject."

Under the above rules, it is respectfully submitted that the evidence in this case wholly fails to show that petitioner did anything it should not have done or failed to do anything it should have done on the occasion in question in connection with the weakening of the stakes on the south side of the car and there is no showing of negligence and no showing of anything except an injury arising from an inherently dangerous operation which was a risk which deceased chose to take in engaging in such occupation.

B. Cutting Stakes Not Proximate Cause.

Assuming for the sake of argument only that the stakes on the south side were cut too deep, still that could not be

the proximate cause of the stakes on the north side giving way. The cause of Riley's injuries were the stakes on the north side breaking; he jumped or fell to the north side of the car and the piling that rolled off the north side of the car crushed him to death. The more the stakes on the south side were weakened, the less likely it was that the stakes on the north side would break. *This is an unrefutable physical law.* Such contention is fully borne out by the holding in the case of *Stokes v. Burlington-Rock Island R. Co.*, 165 S. W. (2d) 229 (Texas Court of Civil Appeals, writ of error refused for want of merit), in which the facts were that all the stakes on the east side of a car of poles were removed except the two end stakes on the east side and it was expected that the load would fall to the east, but when the last two wires were cut, the load fell to the west as well as to the east and it was contended that defects in the staples or stakes along the east side of the car were the proximate cause of the accident, the deceased, in that case, being caught in the poles falling to the west, and the court held on Page 231 of the opinion:

> "It is readily apparent that no defect in the staples or standards along the east side of the car could have been a proximate cause of the accident."

Just so, in the case at bar, any defect in the standards on the south side could not have been the proximate cause of injuries resulting from the standards on the north side breaking unexpectedly.

One of the indispensable elements of proximate cause is foreseeability. It could not reasonably have been foreseen that some of the piling would fall off the north side of the

car when the first wire was cut. Nothing short of "prophetic ken" could have foreseen such results. The experienced men on the job did not expect it. The testimony of the witness, Griffin, in reference to the piling going off both sides of the car when the first of the remaining two wires was cut is typical wherein he testified:

"Q. Had that ever happened before that time?

"A. No, sir.

"Q. You had never seen it happen before in all your experience?

"A. No, sir.

"Q. You didn't expect it to happen then?

"A. No, sir.

"Q. You had no reason to think those poles would go off on the north side yourself?

"A. No, sir.

"Q. You didn't believe they would go off there, did you?

"A. No, sir.

"Q. You have been doing this kind of work a long time, haven't you?

"A. Yes, sir." (R. 92.)

Only one time had any of these experienced witnesses ever seen a load split and fall on both sides and that was after both wires had been cut. (R. 91.) Also, only one time had any of the experienced witnesses seen a load fall off when just one of the end wires was cut and that time the load all came off on the weakened side. (R. 76.) Such rare occurrences are wholly insufficient to establish the fore-

seeability or anticipation necessary to sustain a finding of proximate cause. In the recent case of *Brady v. Southern Ry. Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189, the court points out that there was evidence that the very thing that caused Mr. Brady's death had happened three or four times within ten years of experience by one witness, and very frequently, 25 to 50 times within the 22 years, experience of another witness, but still this Honorable Court says that the testimony was wholly insufficient to sustain a finding that the employer ought to have foreseen and antipicated that it might happen on the occasion when Brady lost his life and affirmed the judgment of the Supreme Court of North Carolina, reversing and rendering the case in favor of the employer in spite of the findings of the jury that the employer was guilty of negligence proximately causing such death, this Honorable Court using the following language:

> "There is thus presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers' Liability cases, this question must be determined by this court finally. * * * The weight of evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury. * * * When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceedings by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims. * * * The rule as to when a directed verdict is proper,

> heretofore referred to, is applicable to questions of proximate cause. * * * Bare possibility is not sufficient. * * * Events too remote to require reasonable provision need not be anticipated. * * * Liability arises from negligence not from injury under this Act. And that negligence must be the cause of the injury. * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

Then, too, other things than the extent of the weakening of the two end stakes just as likely or more likely caused the load to fall prematurely. For example, the wire at the east end broke immediately when the wire at the west end was cut. (R. 92.) There might have been a latent defect in the wire at the east end. Every stake on the north side broke. (R. 78-79.) There might have been some hidden defects in the stakes on the north side. It is, therefore, a matter of speculation and conjecture as to just what caused the piling to fall off the north side. One theory is just as plausible as another. The respondent failed to discharge the burden placed upon her to show that the falling of the piling to the north was more probably caused by the stakes on the south side being weakened to too great an extent than by some defect in the wire on the east end or by some defect in the stakes on the north side.

C. No Negligent Failure to Furnish Safe Place to Work.

It may be true that the unloading of a car of piling is of necessity fraught with inherent dangers. Some one must do the dangerous work. The fact that there was some risk inherent in the very nature of the work does not necessarily convict an employer of failing to furnish a reason-

ably safe place to work. The Court of Civil Appeals recognized that there was no direct evidence of failure to furnish a safe place to work. There was no showing of any loose boards, uneven place, or slick place, or anything to render the place of work any more unsafe than the very nature of the undertaking naturally and necessarily carried with it. No unnecessary peril to life or limb has been or can be shown in the condition of the premises. Surely, the jury became confused between furnishing an unsafe place to work and engaging in a necessarily hazardous line of work, and the Court of Civil Appeals reached out into thin air and grasped non-existent circumstances to support such findings.

D. Unsafe Place of Work Not Proximate Cause of Injuries.

Since there was no evidence of any failure to furnish a reasonably safe place to work, of necessity there can be no evidence of such failure being the proximate cause of Riley's injuries. The cause of the injuries was the falling of the piling to the north. Nothing about the place of work caused the piling to fall unexpectedly to the north or caused deceased to jump to the north.

The place of work was up on the car. There is no showing that Riley slipped, tripped or stumbled over anything connected with the car that caused him to either fall or jump to the north side of the car before the piling fell off the north side. The condition of the ground was not shown to be unsafe, but regardless of whether the ground was hard or soft, level or sloping, smooth or rough, the 18 piling falling off the car on top of Riley would have injured

him just the same. The place where the trouble arose was up on the car. The condition of the place of work had absolutely nothing to do with the accident in so far as the record in this case shows.

E. Res Ipsa Loquitur Not Applicable.

Since respondent pleaded specific acts of negligence and only specific negligence was submitted to the jury, respondent waived any right to recover under the doctrine of res ipsa loquitur. Rule 279 *Texas Rules of Civil Procedure, supra.* In fact respondent did not rely upon such doctrine at all, but same was summoned in desperation by the Court of Civil Appeals in an effort to bolster its foundationless opinion.

Another stumbling block in behalf of applying the doctrine of res ipsa loquitur in this case is the fact that the instrumentality was partly under the control of the injured party. He was taking the lead in the unloading operation. (R. 105.)

Illustrating the rules that both the fact that respondent relied on specific acts of negligence and that the instrumentality being partially under the control of the injured party nips in the bud any possible applicability of the doctrine of res ipsa loquitur is the case of *Stokes v. Burlington-Rock Island R. Co.*, 165 S. W. (2d) 229 (Texas Civil Appeals, writ of error refused for want of merit). In this case the facts were almost identical with the facts in the case at bar and the trial court instructed a verdict for defendant railroad company. In affirming the action of the

trial court in instructing a verdict in favor of the defendant, the court says on Page 231 of the opinion:

> "It is well settled, however, that the mere happening of an accident constitutes no legal ground for the recovery of damages unless the right of recovery be grounded upon the doctrine of res ipsa loquitur under such circumstances as to raise a presumption of negligence. Since plaintiffs allege specific acts of negligence on the part of each defendant to have been the proximate cause of the damages complained of, and since the evidence showed the thing causing the accident was not under the exclusive management of any or all of the defendants but was at least partially under the control of the injured party at and prior to the time of his injury, the rule of res ipsa loquitur has no proper application to this case. (Numerous citations.) Therefore, in order to carry the case to the jury, the burden rested upon plaintiffs to introduce some evidence tending to establish one or more of their specific allegations of actionable negligence."

Numerous Federal court cases likewise hold that the doctrine of res ipsa loquitur is not applicable to this kind of a suit where the facts were fully developed by eye witnesses and where the injured party knew as much about the existing conditions as anyone else on the job.

Petitioner respectfully submits that since there was no direct evidence of any act of negligence proximately causing Riley's injuries and since the doctrine of res ipsa loquitur is not applicable, its motion for an instructed verdict and its motion for judgment in its favor notwithstanding the verdict of the jury were both well taken and should have been granted and this court should grant this writ of certiorari and on final hearing reverse the

erroneous judgments of the courts below, to the end that justice may be done.

POINT NO. II

The Court of Civil Appeals erred in not holding, if there was any evidence of negligence proximately causing Riley's death, that Riley was guilty of contributory negligence solely causing or proximately contributing to cause his injuries.

Argument under Point No. II

The evidence of Riley's active participation in the unloading operation is undisputed. He went up on top of the load to cut the wires. (R. 76.) He climbed up on the car to cut one of those wires. (R. 77.) After he hit the wire and the piling rolled both ways, he fell off the piling or was thrown on the north side and the piling struck him. (R. 77.) He participated in the decision to let the piling fall off the south side. (R. 86.) He then took an axe and got up there and cut the wire on the west end of the car. (R. 89.) When the wire was cut, nobody was on the car but him. (R. 95.) When the time came to cut the wires Mr. Riley got up there. (R. 99.) Riley was experienced and was taking the lead in unloading that car. (R. 105.) When Byles and Waters were sawing on the west end Mr. Riley was standing with them and Mr. Riley used the axe to cut the wire and when he made a lick with the axe the piling burst and Riley went over on the north side. (R. 112.) Riley was taking the lead in unloading that car and knew more about it than anybody. (R. 113-114.) Nobody

told Riley what to do. (R. 117, 118.) Riley acted like he knew what he was doing. (R. 118.)

There are two Federal cases directly in point on the facts but which hold directly opposite to the holding of the Court of Civil Appeals in the case at bar.

In the case of *Anderson v. Southern Ry. Co.*, 20 F. (2d) 71, when the last wire was cut on a car loaded with 70 telegraph poles about 30 feet in length, each weighing in the neighborhood of 800 pounds with a space of approximately five feet between the end of the poles and the end of the car at each end, the standards broke on both sides of the car and Anderson, who cut the last wire, was so injured that he died and the plaintiffs claimed that the stakes used for holding the load in place were neither sufficient in number nor sufficiently strong and that one of the stakes was mildewed and thereby weakened. In holding that the trial court properly directed a verdict for defendant, the Circuit Court of Appeals held that Anderson was bound to have been guilty of contributory negligence as a matter of law, using the following language:

> "A man has no right to be careless and reckless in the face of open and apparent danger, and if he proceeds under such circumstances, he is guilty of contributory negligence to a degree that bars a recovery. The load was secure until the deceased himself destroyed the security. In the case the evidence establishes contributory negligence so clearly as to admit of no other reasonable conclusion with regard thereto.
>
> "The rule in Federal courts is that, where there is no conflict in the evidence, or where no materially different inferences may be reasonably drawn from the evidence, a verdict in accordance with the law may be directed."

To the same effect is the holding of the Fifth Circuit Court of Appeals in the case of *Southern Ry. Co. v. Edwards*, 44 S. W. (2d) 526, in which the facts are strikingly similar to the facts of the case at bar since the poles were leaning a little bit toward the south on which side the poles were to be unloaded and wishing the poles to fall on the south side they cut the standards on that side by sawing them about half through above the cuffs and while the deceased was engaged in cutting the top wires on the north side with an axe and after he had cut two of those wires there was a crash and the poles fell on both sides with the result that the deceased was killed by the poles hitting him, and in which case the court held that the deceased was guilty of contributory negligence as a matter of law using the following language:

> "The condition which gave rise to danger to persons who might undertake the unloading of the car was open and visible, and any danger or risk therefrom to deceased was one which, as between deceased and his employer, was assumed by the foreman. * * *
>
> "Whatever danger there was to one undertaking to unload the poles from the car, due to their condition when they were ready to be unloaded, was of a kind as likely to be appreciated by a person of ordinary intelligence, prudence and experience who might reasonably be expected to take part in the unloading as to any one acting for the shipper or carrier. * * * But whether there was or was not a practical way of avoiding that danger, the deceased was negligent in incurring a danger which was open and apparent. The danger was brought into play by deceased's own voluntary act, done with full knowledge of the situation dealt with and that it involved peril, We conclude that the evidence without conflict shows that the negligence of the deceased caused or proximately contributed to

his injury and death, with the result of barring the asserted right of recovery."

It thus appears that the respondent is faced with the dilemma that either there was no negligence upon the part of petitioner, or if there was any, then that the deceased participated therein and was guilty of contributory negligence under the uncontroverted evidence as a matter of law.

In view of the fact that there is no escape from the conclusion that if there was any negligence, deceased was guilty of contributory negligence, and that under the instruction of the court the jury could only consider contributory negligence in reduction of damages in the event that it had found that Riley was guilty of negligence causing or contributing to cause his death (R. 14-15) and the jury found that Riley was not guilty of negligence proximately causing or contributing to cause his death (R. 12-13), undoubtedly, petitioner has suffered irreparable injury in the amount of damages and this cause should be reversed by this Honorable Court.

POINT NO. III

The Court of Civil Appeals erred in holding that the judgment for Thirty Thousand and No/100 ($30,000.00) Dollars was not excessive.

Argument under Point No. III

The actual earnings of Mr. Riley were shown to average not more than One Hundred Eight and 13/100 ($108.13) Dollars per month. (R. 125-6.) He kept out for per-

sonal expenses about Ten to Fifteen Dollars per month (R. 122-3), and was sometimes out travelling expenses (R. 122), thus leaving net for his family a fair average of not exceeding Ninety-five and No/100 ($95.00) Dollars per month. In his hazardous occupation of a Bridge and Building gang member, he had an expectancy of 27.45 years. (R. 125.) He was as good to his wife as anybody would expect a husband to be and he was interested in the children and wanted to give them the best that he could, educate them, and always wanted them to go to Sunday School and church. (R. 121.) When he was working, he had to be away from home. (R. 121.)

The above gives the entire picture in so far as the measure of damages is concerned. The jury allowed a total of Thirty Thousand and No/100 ($30,000.00) Dollars, apportioning Fifteen Thousand and No/100 ($15,000.00) Dollars to the widow and Five Thousand and No/100 ($5,000.00) Dollars to each of the three minor children (R. 14) and judgment was entered accordingly. (R. 61-2.) The Court of Civil Appeals affirmed such judgment holding in its written opinion that it could not say the damages asessed were excessive in the absence of any fact in the record to show that the jury was actuated by any ulterior motive. (R. 134-6.)

It is the contention of petitioner that respondent was not entitled to recover a greater sum than would produce annually, for the wife during the 27.45 years life expectancy of her husband and for the children during the 9, 11 and 14 years, respectively, until they become 21 years of age, what the wife and children would reasonably ex-

pect from deceased had he lived, the principal sum so provided for the beneficiaries to be exhausted by such annual payment at the expiration of the deceased's life expectancy; in other words, such a sum as will purchase annuities equal to what they reasonably expected to receive from deceased during the period of 27.45, 9, 11 and 14 years, respectively*.

Discounting the gross proposed contributions of the deceased ($95.00 per month or $1176.00 per year) for the full period of his expectancy of 27.45 years (disregarding the fact that the minor beneficiaries would become of age in much shorter time) at the rate of 6% per annum, the monetary loss of the wife and children could in no event exceed Twelve Thousand One Hundred Ninety-five and 39/100 ($12,195.39) Dollars. Such sum subtracted from Thirty Thousand and No/100 ($30,000.00) Dollars leaves Seventeen Thousand Eight Hundred Four and 61/100 ($17,804.61) Dollars, which is certainly excessive for the pecuniary value of the nurture, care and education said children would have received from their father, especially in view of the fact that the deceased's work necessitated his absence from home while he was employed. The sum of Fifteen Thousand and No/100 ($15,000.00) Dollars was excessive for the wife, as was the sum of Five Thousand

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* The law is well settled: "* * * The measure of damages is compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased. In estimating this the earning power of money must be considered and an amount determined, which, capitalized at a reasonable rate of interest, would yield annually the same income the injured person might have expected from the deceased, using the interest and part of the capital from year to year. * * * In U. S. v. Boykin, 49 F. (2) 762, we again adopted the rae of six per cent per annum in awarding damages to a father for the death of his son. We consider that rate just and reasonable." **Sabine Towing Co., v. Brennan, 85 F. (2d) 478 (Fifth Circuit).**

and No/100 ($5,000.00) Dollars for each of the three children.

The excessiveness of the verdict is further illustrated by the fact that the income from Thirty Thousand and No/100 ($30,000.00) Dollars at 6%, or even at 4%, per annum would exceed the net income of Riley and at the end of the periods of expectancy, the principal sums would still be left untouched.

The amount of the verdict furnishes within itself the best evidence of its excessiveness, and showed that the jury was swayed by something besides the evidence. Clearly the judgment is grossly excessive and relief from this Honorable Court is fully merited on behalf of petitioner.

CONCLUSION

The state courts in this case have clearly refused to apply the law as established by the Federal courts to cases coming under the Federal Employers' Liability Act. An important principle of law is involved as to whether the doctrine of res ipsa loquitur is applicable under the facts of this case and a dangerous precedent will be established unless stopped by this Honorable Court in line with its previous holdings which the state courts should respect rather than ignore. The Federal precedents have also been disregarded in the matters of contributory negligence and the measure of damages. Such precedent should not be tolerated by this Honorable Court.

WHEREFORE, petitioner respectfully prays that this Honorable Court issue writ of certiorari so that on final

hearing hereof, the judgments of the state courts in this case may be reversed, to the end that uniformity may prevail and that justice may be done.

Respectfully submitted,

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(10)

In the

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1252

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

v.

MRS. G. J. RILEY, ADMINISTRATRIX,
Respondent.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

List of Authorities

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REPLY TO PETITION FOR WRIT OF CERTIORARI

GENERAL STATEMENT

Respondent contends that the only question involved is whether there was sufficient evidence to justify the jury finding that (a) Riley's death was proximately caused, in whole or in part, by other employees than Riley negligently cutting or weakening the stakes on the car to such extent as to cause the entire load of piling to give way when Riley cut the first wire, at the West end of the car; or (b) that Riley's death was proximately caused, in whole or in part, by the petitioner having negligently failed to furnish him a reasonably safe place to work. The testimony produced showed, or certainly raised the issue, that petitioner negligently caused Riley's death; and petitioner's failure to produce its foreman as a witness and have him explain or refute its effect, was equivalent to admitting its liability.

By not offering any testimony as to liability, petitioner admitted as true all that was introduced by the respondent, with all the presumptions and inferences that could be drawn from it, aided by petitioner's failure to produce its foreman, Walters, who was in charge of all of the work, and helped cut or saw some of the stakes (R. 111 and 115); probably the one that first gave way and caused Riley's death, and have him testify concerning the matters about which respondent had offered strong testimony against him; especially in view of the fact that the foreman had helped cut one stake at the West end of the car (R. 111), and had directed and controlled the depth or extent to which it was cut or weakened (R. 115); and then went up on the car with Riley (R. 97, at top), from which, and the failure of the foreman to testify, the jury had the right to infer that he counseled with Riley; and probably assured him that everything was safe and ready for him to cut the wire; and then jumped off of the car before Riley cut it.

The Court of Civil Appeals and the Supreme Court of Texas having adopted the jury findings of negligence on the part of petitioner in cutting or weakening the stakes to such extent as to cause them to prematurely give way and the load of piling to collapse, scatter and kill Riley; and also, the jury finding of negligence in failing to furnish Riley a reasonably safe place to work, the petition for certiorari should be denied; for it has not been, and can not be made to clearly appear, that palpable error was committed in affirming the judgment of the trial court.

STATEMENT OF THE EVIDENCE

(The name sometimes spelled Waters and sometimes Walters refers to the same person—the foreman.)

The following testimony, given by witnesses in person before the jury was sufficient to sustain, if indeed it did not compel, the jury finding that Riley's death was proximately caused in whole or in part (a) by other employees than him having negligently cut or weakened the stakes to such extent as that they prematurely broke and caused the load of piling to collapse and kill him; or (b) by the petitioner having negligently failed to furnish him a reasonably safe place to work.

The witness, Griffin, having testified (R. 66-67) that he had been with the gang for about one and one-half years at the time Riley was killed, which was December 19, 1942, further testified (R. 72, line 25 to line 11, page 73) that there were 54 piling on the car that they were unloading, and that during all of the time he had worked on the job, that the average cars unloaded at bridges was from 30 to 40 piling per car; that he had never seen a car with as many piling on it as the one they were unloading when Riley was killed. And (R. 73, lines 19-20), that the gang was under the control and supervision of Mr. Walters. And (R. 74, lines 7 and 8), that all of the gang worked under Walters' instructions.

Griffin testified (R. 74, beginning with line 14), that they had cut the stakes on the south side of the car, and on through line 20 that they were all taken out except one at each end, and that they were partially cut in two.

Griffin testified (R. 76, line 27), that on previous occasions when the cars being unloaded had 30 to 40 piling on them, the end stakes were cut as on the occasion when Riley was killed, and the others were removed.

Griffin testified (R. 85, near bottom, and top of page 86), on cross-examination that they were following the custom and practice that the gang had theretofore followed in the work of unloading cars of piling, and did not deviate from that custom and practice in unloading the car when Riley was killed.

Griffin testified also (R. 89, lines 18-25), that Walters climbed up on the piling car, and that Walters and Riley were both standing on the deck of the car at the West end of the piling before the wire was cut.

R. 94, near bottom of page, and at top of page 95, the witness Griffin testified that the load of piling would be controlled by the depth or extent to which the end stakes were cut, and that this could be controlled by the parties handling the axe or cutting device on the stakes, and that the foreman, Walters, was in charge of all that work, cutting and everything, on the occasion of Riley's death, and had the power to control the extent or depth to which the stakes would be notched. That Walters was in charge of the gang and all of the work, including notching of the stakes.

Griffin also testified (R. 95) that prior to unloading the car that caused Riley's death he had never seen a car where the piling fell off before they cut the last wire.

Griffin testified (R. 97, beginning at top of page), that Walters, the foreman, and Riley crawled up on the end

of the car before Riley cut the wire, and that before the wire was cut, Walters jumped off and was on the ground instead of standing on the end of the car—that he did get up on the end of the car before Riley got up there.

R. 99, the witness R. E. Nelson testified, with reference to Riley:

"Q. He didn't actually do any of the stake cutting, or did he?

"A. No, he didn't do any of that that I saw."

The witness, R. E. Nelson testified (R. 103, near bottom) that he saw the foreman Walters, and Walter Byles, and that they were notching the stake on the West end of the car with a cross-cut saw.

R. E. Nelson testified (R. 106) that they had weakened the stakes as they customarily weakened them.

NOTE: It is believed that such testimony of this witness and similar testimony of other witnesses, justified the jury finding that they weakened the stakes to the same extent as they had theretofore weakened the stakes on cars that carried only 30 to 40 piling. If the petitioner doubted that those words meant it was to the same depth as on the other occasions when they were unloading the cars with only 30 to 40 piling, it could have easily pursued the matter with the testimony of its foreman, the only living man who, it appears, could have testified about it, for it had foreclosed Riley's ability to do so, by killing him.

R. E. Nelson also testified (R. 108) to the effect that he had never theretofore seen a load of piling unload or

break through and fall off when the first wire was cut. Also, R. 108, near bottom, that the extent of notching would determine when the stake would break. Also, R. 108, at bottom:

> "Q. On this particular occasion do you know whether or not the stakes at the West end broke first, or the stake at the other end of the car?
>
> "A. The West end broke first."

The witness, Van Martin, testified (R. 111) that Walters was in charge of the work, and that he saw Walters and Mr. Byles cutting a stake on the West end of the car.

R. 115, near middle of the page, Walter Byles testified that he helped Walters cut one stake half in two, and that he had never cut a stake before, and he did not have any idea how it should be cut. That Walters said "we would saw it about half in two." That Walters decided and told him when it was time to stop. This witness testified (R. 116) with reference to the sawing and cutting of the wire, as follows:

> "Q. How long after that was it before Mr. Riley cut the wire?
>
> "A. Just as quick as he could climb up there and cut it."

After testifying that he had never seen a car with as many piling on it as the one that was being unloaded when Riley was killed, Griffin further testified (R. 73, near center of page), that when the train was brought in with the piling, the conductor said to the gang, in the presence of the foreman, that if they got it unloaded they

would have to hurry, there was a passenger train right on it. Other witnesses so testified.

We believe it is quite clear that the testimony we have presented and referred to shows that the jury findings are amply sustained. But, we feel it is our duty to call to the court's attention the following parts of the petition for certiorari.

ERRONEOUS STATEMENTS OF THE TESTIMONY RELIED UPON IN THE PETITION

On page 2 of the petition, it says:

> "Such fully developed and uncontroverted evidence shows that Riley was the most experienced member of the bridge and building gang." (Citing pages relied upon: R. 86, 105, 114-5, 118.)

An examination of the cited pages discloses that the witness Griffin (R. 86) merely said that he was just "as much" (experienced) as any of them.

The witness, Nelson (R. 105), answered the query that he didn't know about that. The witness, Martin, who had been on the job little, if any, more than a month (R. 110), said (R. 113-4), that Riley "knowed more about it than any of us." The other witness, Byles, who had been with the gang for two and a half weeks, testified (R. 118), in answer to questioning:

> "Q. * * * Mr. Riley was taking the lead unloading that car?
>
> "A. He cut those wires.
>
> "Q. Wasn't he taking the lead unloading it?
>
> "A. I don't know.
>
> "Q. Mr. Riley acted like an experienced man?
>
> "A. He just went and cut that wire, is all I know."

And the witness, Van Martin testified further about Walters (R. 114):

"* * * They say he had been with the company a long time.

"Q. Who had the actual charge of the work, Mr. Riley or Mr. Walters?

"A. Well, Mr. Walters was scratch boss."

SUMMARY OF ARGUMENT

I.

Respondent ignores petitioner's complaint that the verdict is excessive, because it is plainly a question of fact, and this court will not heed the invitation for it to get into the jury box and usurp its functions. We call attention, however, to the fact that this contention is fully and satisfactorily answered in that part of our brief in the Court of Civil Appeals in Texas, printed pages 109 to 115 inclusive, appendix to petitioner's brief in support of its petition for writ of certiorari.

II.

From the time the car of piling was loaded until the stake at the Southwest corner of the car prematurely gave way, causing the immense load to spread and break the stake and the wire at the other end, and all of the stakes on the North side of the car, which caused Riley's death, the car, the piling and the men who had anything to do with unloading it were in the exclusive control, and under the exclusive management of the petitioner.

III.

It is obvious that the stake at the Southwest corner of the car prematurely broke, because it had been weakened too much for it to hold, as was intended, against the time when the wire at the other end of the car could be cut; which would have let the two stakes on the South side of the car give way, and the piling roll off on that side, without causing a scrambling collapse of the load; or, interfering with the stakes on the other side.

AUTHORITIES

Hattie Mae Tiller, Exr. of Estate of John Lewis Tiller, Petitioner v. Atlantic Coast Line R. Co., 89 U. S. L. Ed., Adv. Op. No. 6, 403;

Mary Tennant, Admx. of Estate of Harold C. Tennant, Deceased, Petitioner v. Peoria & Pekin Union R. Co., 88 U. S. L. Ed., Adv. Op. No. 6, 326;

Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, 87 L. Ed. 610 (first reversal).

We believe that the law is so clearly settled by these very recent opinions of this court that we should refrain from citing additional authorities to sustain the judgment of the lower court in the Riley case, in which it appears to us that any reasonable consideration of the testimony leads to the inevitable conclusion that the jury findings of fact are abundantly supported by the evidence.

It is likewise believed that if the unsupported erroneous assertion of the petitioner, that things therein stated are

shown by the undisputed evidence, were eliminated from its petition and brief, that its efforts to get its petition granted would be hopeless.

The petitioner had proceeded as if it were entitled to a review of this case by this court, if it could show that there was evidence sufficient to have justified the jury in finding a verdict in its favor; entirely unmindful of the fact that in these cases, as announced in *Tennant v. Peoria & Pekin Union R. Company, supra:* "* * * courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because judges feel that other results are more reasonable."

In the *Tennant case* this court seems to have definitely held that conflicting inferences and presumptions do not authorize the court to say they destroy each other; but it is the province of the jury to decide which, or if either should prevail.

It seems it is now well settled that writ of certiorari will be granted in Federal Employers' Liability cases, only where the basis of fact upon which the State court rested its decision denying the Federal rights, is wholly without any support in the record. That is to say, "It is not the province of this court to weigh conflicting testimony."

Riley having lost his life and being unable to speak, it is presumed that he was entirely free from negligence; that he did everything that a reasonably prudent person would have done; and did nothing such a person would not have done. The petitioner and its foreman owed the ever-pres-

ent duty of not negligently subjecting him to danger. The foreman weakened a stake at the west end of the car, which was the end stake, or became the end stake, by the then standing end stake, being removed after he had weakened this stake; at least, the jury had the right to believe that part of Byles' testimony, in which he said in effect that immediately after sawing that stake, and not removing it, Riley went upon the car and cut the wire; and also had the right to believe the testimony of other witnesses, who said that the foreman Walters preceded Riley in going on the car; for the testimony quite conclusively shows that there were not two—but only one stake there when the wire was cut.

Under such circumstances, the foreman was called upon to speak, and in view of him being kept off of the witness stand by the petitioner, the jury had the right to conclude that he counseled and advised Riley that it was safe for him to cut the wire; if indeed it was not sufficient to justify the jury in concluding that he commanded him to do so.

We treat as unworthy of answer the petitioner's wild, unsupported suggestion that the evidence showed that Riley cut the stakes that gave way.

CONCLUSION

It is believed that petitioner's suggestion that the breaking of the stakes on the North side of the car was unforeseeable, and therefore not a proximate cause of Riley's death, borders on the ridiculous; for inasmuch as it is

certain that those stakes were caused to give way by the stake at the West end breaking, and the pilings spreading at that end, they acted as levers in a mighty shearing movement, causing everything before them to give way.

Petitioner and its foreman, Walters, were charged with knowledge that it would be unsafe and dangerous to weaken the stakes on this car to the extent that they had theretofore weakened the stakes on the much lighter loads that they had unloaded, which fully appears from the testimony. Yet, the testimony supported the jury's finding that they did just that. It is believed that this testimony not only raised the jury question, but that it compelled a jury finding in favor of the respondent, and that the petition for certiorari should be denied, which is respectfully requested.

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